Supreme Court, U.S.
FILED
05-108 MAY 12 2005
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NO.:_____

IN THE

SUPREME COURT OF THE UNITED STATES

INDUSTRIAL TECHNOLOGIES, INC.,

Petitioner,

vs.

CAPITAL ALLIANCE INSURANCE COMPANY, INC. and CAPITAL ASSURANCE COMPANY, INC.

Respondents.

On Petition For A Writ of Certiorari To The Supreme Court of the United States From Decision of the Supreme Court of Alabama

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the right to due process of law guaranteed to Industrial Technologies, Inc., by the Fourteenth Amendment to the United States Constitution was deprived when the Trial Court and the Alabama Supreme Court each issued no opinion decisions granting motions for summary judgment to two (2) insurance companies that Industrial had sued for breach of contract and bad faith.

2. Whether the no opinion decision granting summary judgment to said insurance company defendants was tantamount to the denial of a remedy to Industrial Technologies, Inc., and access to the courts contrary to the Fourteenth Amendment due process clause of the United States Constitution.

3. Whether the no opinion decision denying Industrial's claims is tantamount to the denial of Industrial's right to a jury trial remedy and of the right to an appeal remedy when each is enjoyed by all other persons in the State of Alabama alleging similar claims and similarly situated as to the facts of the Industrial Technologies claims, thereby violated the equal protection clause of the Fourteenth Amendment to the United States Constitution.

4. Whether the Trial Court's granting of Summary Judgment to two (2) insurance company defendants, coupled with the Alabama Supreme Court's application of Rule 53(a)(1) and 53(a)(2)(f), *Alabama Rules of Appellate Procedures* (the no opinion rules), constitutes, under the facts of the case, an impairment to the enforcement of the obligation of contract owed by Capital Alliance Insurance Company and Capital Assurance Company to Industrial Technologies, Inc., in violation of

the contract clause to the United States Constitution, Article I, Section 10, Clause 1.

PARTIES TO THE PROCEEDINGS

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Industrial Technologies, Inc., an Alabama corporation, petitions this Court for a Writ of Certiorari to review a No Opinion Judgment and Order of the Supreme Court of Alabama, affirming a No Opinion Motion for Summary Judgment Order of the Circuit Court of Autauga County, Alabama, entered against it as being issued contrary to the due process and equal protection clause of the Fourteenth Amendment to the United States Constitution and Article I, Section 10, Clause 1 (the contract clause) of the United States Constitution.

JURISDICTION

The No Opinion Judgment of the Supreme Court of Alabama that adjudicated an issue presented under the Fourteenth Amendment due process and equal protection clauses of the United States Constitution and under Article I, Section 10, Clause 1 (the contract clause) of the United States Constitution was entered on December 17, 2004. A rehearing was sought in the Supreme Court of Alabama and denied on February 11, 2005. All orders of the Alabama Courts were issued without opinions and constitutes the substantial basis of the issues presented.

United States Supreme Court Rules 10(b), 10(c.)
Provisions for Jurisdiction are met under
28 U.S.C. § 1257
28 U.S.C. § 1207
28 U.S.C. § 2101

United States Constitutional Provisions Involved:

Amendment XIV

Fourteenth Amendment to the Constitution of the United States:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws."

Section 10.
[Restrictions upon Powers of States]

No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make any thing but gold and silver a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligations of contracts, or grant any title of nobility.

OPINIONS BELOW

1. The Order of the Circuit Court of Autauga County, Alabama, in the case of Industrial Technologies, et. al vs. Capital Alliance Ins. Co., et. al, CV-02-194-F granting the Summary Judgment Motions of Capital Alliance Insurance Co. and Capital Assurance Company, Inc. was not reported. The Order was dated January 26, 2004, and amended on February 12, 2004. Appendix A1-3.

2. The No Opinion Judgment of the Supreme Court of Alabama affirming the No Opinion Circuit Court of Autauga County, Alabama, Judgment granting the Motions for Summary Judgment as filed by Capital Alliance Insurance Co., Inc. and Capital Assurance Co., Inc., Case No. 1031438 is dated December 17, 2004, but is not yet reported. The No Opinion Judgment of Affirmance does not appear in the record, but appears at Appendix A-4.

3. The No Opinion Order of the Supreme Court of Alabama denying a rehearing to Petitioner Industrial Technologies, Inc. is dated February 11, 2005. The Order is not yet reported. The Order does not appear in the record but appears at Appendix A-5.

STATUTES INVOLVED

28 U.S.C. § 1257
28 U.S.C. § 1207
28 U.S.C. § 2101
Alabama Statutes:
6-2-34, Code of Alabama, 1975 - Appendix A-6
10-2B-11.06, Code of Alabama, 1975 - Appendix A-7
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Alabama Rules of Civil Procedure, - Appendix A-9
Rule 9(c.)
Alabama Rules of Appellate Procedure, - Appendix A-10
Rule 53(a)(2)(c)
Alabama Rules of Appellate Procedure, - Appendix A-10
Rule 53(a)(2)(f)

STATEMENT OF THE CASE

A. NATURE OF THE CASE

This case originated as an appeal of a ruling of the Circuit Court of Autauga County, Alabama, granting summary judgment to two (2) insurance company defendants, namely: Capital Alliance Insurance Co., Inc., an Alabama corporation, (hereinafter referred to as Capital Alliance); and Capital Assurance Company, Inc. (hereinafter referred to as Capital Assurance). Capital Assurance is a foreign corporation. However, Capital Assurance is a surviving merger partner of Capital Alliance, an Alabama insurance corporation (C-119-23, Affidavit of Nancy P. Gordon). The Summary Judgment Order granted a Summary Judgment to Capital Alliance and Capital Assurance as to all allegations of a Complaint jointly filed by Petitioner Industrial Technologies, Inc., an Alabama corporation, and Richard O. Hill alleging that both of the insurance companies breached a contract of insurance with Industrial Technologies, and in the process, committed such wilful and intentional acts and omissions to constitute and satisfy the elements of the tort of bad faith denial of insurance coverage proceeds or benefits under Alabama law (C-82-92, Third Party Complaint). Industrial was an insured under the policy of insurance with Capital Alliance and made the bad faith claim. Capital Assurance is the surviving merger partner of Capital Alliance and executed a 1996-1997 extension policy with Industrial. (C-119-123, 347), which is the basis of all claims.

B. COURSE OF PROCEEDINGS AND DISPOSITION BELOW

On July 2, 2002, Whitney National Bank filed an

action against Industrial Technologies, Inc. and Richard O. Hill, Sr., its sole stockholder making claims in two counts:

In Count I, Whitney alleged that Industrial (an Alabama corporation) executed a promissory note to Whitney on March 2, 2001, which note was guaranteed by Hill and now in default. Whitney requested judgment for $139,150.00 as principal due, $11,433.42 as interest due at 10.75% and a reasonable amount of attorney fees alleged to be $20,892.00, for a total damage demand under Count I of $171,455.42. In Count II, Whitney alleged that Industrial and Hill executed numerous promissory notes and collateral security agreements under a continuing business loan transaction series, which final note was past due and unpaid. Whitney demanded possession of the collateral shown in the collateral security agreements and UCC filings. The Complaints exhibits were a long series of notes, Bank of Prattville/Industrial Commercial Security Agreements beginning on July 5, 1996, a list and appraisal of property and equipment secured, and properly executed and filed financing statements covering the period from July 5, 1996 (C-12-42). Whitney amended the Bank of Prattville security filing on September 11, 2001 in order to re-establish security in all proceeds and instruments pertaining to the collateral described in the security instruments and listed/appraised equipment (C-37). Whitney as the surviving statutory merger partner of the Bank of Prattville, claimed successor legal right to all of the Bank of Prattville's secured instruments.

Industrial and Hill filed their responses and objected to the Whitney Complaint. Industrial and Hill filed an Answer and Counter Claim against Whitney primarily contending that Whitney was estopped and otherwise barred from bringing the collection action by virtue of its breach of a forbearance agreement by and between Industrial, Hill, the Bank of Prattville and

Whitney concerning a conversion action involving insured collateral (C-45-82). Moreover, on September 3, 2002, Industrial and Hill filed third-party claims against Capital Alliance and Capital Assurance (C-82-104). The Third Party Complaint alleged as follows: that Capital Alliance and Capital Assurance (by statutory merger) breached an insurance contract to pay Industrial and Whitney for insured collateral which had been wrongfully converted and destroyed by a third party (Jacobs Bank); for its unlawful and reprehensible failure to pay Whitney the contracted for insurance proceeds under a "loss payee" clause (insuring the collateral/proceeds to Whitney Bank) after lawful notice, demand and compliance with all conditions of the insurance agreement (C-45-81). Industrial alleged that the conduct of Third Party Defendants Capital Alliance and Capital Assurance, was unjustified, deliberate, intentional and reprehensible and breached its legal duties to Industrial and Hill, which breach also constitutes the tort of bad faith denial of Industrial's insurance claim. Thereafter, the insurers answered the claims and denied the allegations (C-105-114). The insurers Capital Alliance and Capital Assurance, however, admitted a continuous insurance contract between all parties covering a period from 1991 to January 27, 1997, but asserted several defenses.

Motions to dismiss the Complaint of Industrial and Hill were filed by Third Party Defendants Capital Alliance and Capital Assurance but denied by the Circuit Court of Autauga County, Alabama. (C-6, 115, 117). Thereafter, a Motion for Summary Judgment was jointly filed by Capital Alliance and Capital Assurance (C-382-454). After review of the material, the Circuit Court of Autauga County, Alabama, granted the Motions for Summary Judgment filed by Capital Alliance and Capital Assurance. The Order was filed on January 26, 2004. (C-832-834) and amended on February 12, 2004 (C-845).

The Circuit Court made no findings of fact nor drew legal conclusions. On February 25, 2004, Industrial and Richard Hill served their Motion to Alter, Vacate or Amend, pursuant to Rule 59, *Alabama Rules of Civil Procedure* (C-846-856), which was amended on February 26, 2004 (C-886). Capital Alliance and Capital Assurance each filed responses prior to April 15, 2004 (C-879-944). On May 3, 2004, the Circuit Court of Autauga County, Alabama, denied the Motion to Alter, Vacate, and/or Amend, again, without opinion. (C-6) The Appeal was filed on Monday, June 14, 2004, alleging that the Court improperly granted the Motions for Summary Judgment as filed by the insurance company defendants, and contending that material facts and law were in issue as to the tort claims but that Industrial would be entitled to a directed verdict as to its breach of contract claim in that it could not be refuted by credible admissible evidence. (C-895-898).

The Alabama Supreme Court affirmed without opinion on December 17, 2004. A rehearing was sought by Industrial alleging in relevant part that the no opinion orders violate Industrial's rights under the Fourteenth Amendment to the United States Constitution, as well as the contract clause of the United States Constitution. The Application for Rehearing was denied by the Supreme Court of Alabama, without opinion under Rule 53(a)(1) and 53(a)(2)(f), *Alabama Rules of Appellate Procedure*, on February 11, 2005. Hence, this Petition for a Writ of Certiorari.

C. The Facts Presented to the Alabama Courts

Industrial Technologies, Inc. entered into a loan transaction with Whitney National Bank's predecessor in interest by merger, the Bank of Prattville in 1991. The loan was in the amount of $150,000.00. The loan was secured by equipment located on premises in Scottsboro,

Alabama, and secured through a Uniform Commercial Code (UCC) Financing Statement recorded with the Secretary of State of Alabama. (Affidavit of Albert C. Striplin, Bank of Prattville Officer Vol. 4-782). Mr. Striplin stated the loan required Industrial to: (a) Have Richard O. Hill, Sr., guarantee the loan; (b) that insurance be taken to insure collateral/equipment and that the Bank of Prattville be named loss payee and an additional name insured under the Capital Alliance policy in issue. Mr. Striplin stated all conditions of that loan were satisfied by Industrial (Vol. 4-782-783). It is undisputed that all such conditions were satisfied from the agreement date until January 27, 1997 when the Capitals withdrew from the State of Alabama,

The 1996 policy of insurance in effect at the time of the alleged loss appears at Vol. 4-646-660. The declaration page reflects the "Loss Payee" as the Bank of Prattville. Vol. 1-28-96, (also Vol-4-636). The policy was at replacement value under contract, without deduction for depreciation The policy provides under pertinent provision as follows (Vol. 4-655):

"C. Lenders loss payable.
1. The Loss Payee shown in the schedule or in the declaration as a creditor, including a mortgage holder or trustee, whose interest in covered property is established by such written instruments as: ...
c. Bills of Laden
d. Financing Statement; or
e. Mortgages, Deeds of Trust, or security Agreements.
2. For Covered Property in which both you and a Loss Payee have an insurable interest:
a. We will pay for covered loss or damage to each Loss Payee in their order of precedence, as interest may appear...
C. If we deny you claim because of your acts or because you have failed to comply with the terms of the coverage

part, the Loss Payee will still have the right to receive loss payment if the Loss Payee:
(1) pays any premium due under this coverage part at our request if you have failed to do so;
(2) submits a signed sworn proof of loss within sixty (60) days after receiving notice from us of your failure to do so;..."

The policy also provided for payment of the proceeds to the Bank of Prattville in the event of any alleged failure to satisfy any conditions of the policy by Industrial. Additionally, the loss payable conditions placed the burden on the insurer (Capital) to provide notice to the Bank of Prattville of any failure of Industrial to comply with conditions of the policy. Capital undisputably failed to satisfy this provision of the policy.

Additionally, the policy provided as follows with respect to the duties placed on the insured in the event of loss or damage:

"3. Duties in The Event Of Loss Or Damage
a. You must see that the following are done in the event of loss or damage to Covered Property:"

The duties under 3(a) included prompt notice and description of property; how loss occurred; protect the property; file inventories and values; permit investigation; sign sworn proof of loss on Capital form; and cooperate.

3(b) of the policy provided:

"b. We may examine any insured under oath, while not in the presence of any other insured and at such times as may be reasonably required, about any matter relating to this insurance or the claim, including an insured's books and records. In the event of an examination, an insured's answers must be signed."

The policy provided for the taking of a deposition in 3(b)where all of the information requested in 3(a)(1-8) could be obtained. It is undisputed that Industrial fully cooperated with Capital and provided all documents requested, as well as submitted to a deposition and sworn proof of loss under 3(b) of the policy.

The policy provided a duty to pay and also undisputedly was modified to include a duty to pay or to defend. 4(e) provided:

"...e. We may elect to defend you against suits arising from claims of owners of property. We will do this at our expense." (Vol. 4-649)

After discussions concerning the Capitals failure to pay, Whitney as successor by merger in interest to the Bank of Prattville sued Richard O. Hill, Sr. and Industrial Technologies, Inc., demanding judgment in the amount of $171,455.42. Vol. 1-12. Count II of the Complaint demanded possession/recovery of the secured equipment and collateral under the Bank of Prattville and Whitney notes and security agreement (Vol. 1-13). The recorded UCC Financing Statement is attached to the Complaint. (Vol. 1-37,38). An appraisal was recorded with the UCC on March 1, 1996 Vol. 1-39-41. The total appraised value of the insured equipment was $497,874. The UCC was executed by Whitney as successor by merger to the Bank of Prattville. The various renewals and extensions of the promissory note (originally issued in 1991) begin with July 1996, (Vol. 1-14-36). The July 1996 Commercial Security Agreement (Vol. 1-32-36) dated on July 5, 1996 secured "equipment located at American Detention Products, Inc., Scottsboro, Alabama..." (Vol. 1-36). It is a stipulated fact of record that the policies were in force and effect at least through January 27, 1997.

D. THE EVENTS

Jacobs Bank at Scottsboro wrongfully converted the Industrial property. The facts underlying the Jacobs Bank (hereinafter referred to as Jacobs) litigation, the loan agreements and the insurance policy are set forth in Richard Hill's Affidavit which appears at Vol. 3-499-512. Mr. Hill stated (Vol. 3-503) that Jacobs obtained approval from the bankruptcy judge to move forward against a debtor known as ADPI in July 1992. The Bank wrongfully took possession of the Industrial equipment which was allegedly secured under a ADPI/Jacobs loan. The Bank took possession of all the equipment (including Industrial equipment located at the premises Vol. 3-504,505). Industrial's counsel provided Jacobs' attorney a letter including bills of sale and invoices of the equipment under which Industrial claimed ownership of the property taken. On or about April 1993, Hill went to the premises where the equipment was being stored but was unable to verify that a milling machine and a hardness testing machine were missing or present. As a result Hill (for Industrial) filed a claim with the insurance agent who had issued the then relevant policy with Capital on June 28, 1993, requesting that Capital investigate the claim. Industrial, followed up this claim with another letter dated January 20, 1994, wherein Hill stated that he had discussed the claim with an adjuster but had not heard further. According to Industrial statement given in July, 1993 (Vol. 4-664-675), an agent issued a report to Capital Alliance regarding the investigation of the claim with respect to the two pieces of equipment and acknowledged that Capital Alliance knew of the Jacobs litigation wherein Jacobs contested title to the equipment which was converted or contested by Jacobs. This was admitted in a memo on October 14, 1993. The second page of this report to Capital stated "You may wish to determine the outcome of the suit

whereby Jacobs is claiming ownership of the property. If the court awards ownership to the Bank, the insured might not have a insurable interest." (Vol. 4-677-678).

In October 1995, however, Hill discovered that someone had placed some of the contested equipment outside the premises at Goose Pond Industrial Park (some of the equipment was still inside the premises). He reported this to Richard Austin at Jinwright-Turner Insurance Agency and requested that Mr. Austin contact Capital. Mr. Hill further stated that in June 1996, he discovered that Jacobs had actually sold some of the equipment. Not long thereafter he determined that all the contested equipment (including the equipment which had been inside the premises) had been destroyed, sold or salvaged and not just a portion thereof. (Vol. 4-507). Hill stated that in July or August 1996 he became convinced that a wrongful conversion claim, based upon an insurable interest under the policy, now existed. A notice was given to Capital in 1996 and, again, in May 1997. (Vol. 5 p.830.)

At the request of Capital, Mr. Hill (for Industrial) on May 4, 1998, submitted to a sworn deposition providing his proof of loss (the examination was performed by Capital's attorney (Vol. 4-685-776). Industrial understood this sworn statement as being in full compliance with Section 3(a) and (b) of the policy as requested at the time by Capital's attorney. The exhibits to the deposition were taken from the boxes of materials provided to the attorney for Capital by Industrial's counsel. This information included Exhibit 1, Appraisal Data Sheet; Exhibit 2, the list of equipment; and Exhibit 3, stipulated and agreed equipment values. (Vol. 4-701). Counsel for Industrial noted that substantial materials had been previously provided to Capital's attorney; some of which were given on March 25, 1998.

Capital also had constructive (if not actual) notice of a mediation/arbitration process in which Hill had been

engaged in the Jacobs case by reason of its prior 1993-1994 notice and investigation.

It is undisputed that Industrial cooperated in all respects with every reasonable request made by Capital's Counsel. On or about March 17, 1998, Capital, through its attorney, acknowledged a March 12, 1998, meeting between counsel for Industrial and Capital. In correspondence, counsel stated: "If you know of any other documents or pleadings in your file which would be helpful in my inquiry as to whether or not coverage exists in this claim, I would appreciate it if you would send that along as well." (Vol. 1-147). Industrial's attorney complied with said request, as confirmed by the letter from Capital's attorney, dated March 26, 1998. "I am in receipt of your package of materials. I do appreciate your providing that information." (Vol. 1-148). Capital's counsel went on to state, "I had also requested a copy of the appraisal performed by Jacobs Bank on this equipment. Additionally, is Jacobs Bank contesting the ownership during the present litigation? I understand that for the purposes of mediation that they stipulated that the equipment was owned by Industrial. However, with the Supreme Court Opinion and the ruling of Randall Cole, I doubt that stipulation would be admissible .... Was there any judicial determination by any court of competent jurisdiction that the property was in fact owned by Richard Hill or Industrial Technologies?..." (Vol. 1-148). Capital was again providing evidence of its position (stated by Bobby Mizell in 1994) that they were awaiting judicial determination as to the issue of title to the equipment to establish whether coverage existed for the claim. (Vol. 1-148).

Capital Alliance never asked for additional information concerning the claim and never sent a reservation of rights letter to Industrial, nor was there any denial of any claim asserted by Capital under the policies or policy provisions. Clearly Industrial provided

a sworn proof of loss in May 1998, and asked for all benefits under the policy. This included the benefit of payment or any duty to defend.

Notices of the claim were, however, made by Industrial prior to the January and May 1998 notice. Hill testified that he noticed Richard Austin in 1996 as well as notified Jinwright-Turner in 1997. In fact, the unrefuted evidence is that Ms. Wingard confirmed that she worked for Jinwright-Turner Insurance and Bonds in Montgomery, Alabama, in the early spring of 1997 (Vol. 5-830); that she was manager of all claims filed for the policies of insurance issued through Jinwright-Turner which included the Capital policy. She stated that Mr. Hill reported a claim concerning equipment which Industrial had insured through her company and agents. She stated that in 1997 Mr. Hill was making a claim because the equipment had been destroyed. She further stated that she faxed the information concerning that claim to Capital Alliance immediately after she met with Mr. Hill. Ms. Wingard stated that Mr. Hill (for Industrial) provided documentation which she had requested as part of the claims process. She stated that would have been on or about May 12, 1997, and that she, as claims manager for Jinwright-Turner, forwarded the claim on to Capital. She further stated that a claims file was set up on that claim. (Vol. 5-830).

E. THE CONVERSION CLAIM DECISION AGAINST JACOBS

In the Jacobs litigation, after a Mandamus was denied, the jury returned a verdict on December 7, 2001, declaring that Industrial was the owner of the equipment and awarding Industrial compensatory damages of $148,000.00 and punitive damages of $250,000.00 (Vol. 4-786-787). Interest in the amount of $82,000.00 was later calculated and added to the award. Punitive

damages were set aside but re-instated by the Alabama Supreme Court on appeal. See Vol. 3-424, 427-442. The conversion issue was not appealed by Jacobs.

After the jury verdict, which confirmed title to the equipment in Industrial and before any payment was made by Jacobs to Industrial, (and as a result of a Whitney threat to call the renewal loan), Industrial demanded payment to Whitney under the Capital policy of insurance insuring both Industrial and Whitney (as loss payee). Industrial further advised The Capitals of possible additional damages, interest and attorney fees if the claim was not paid. Those notices were confirmed by counsel for Capital dated August 14, 2002, in the letter appearing at Vol. 2-417 where Capital denied the claim. This letter also represented the first notice of denial of Industrial's claim under the policy. This is conclusively shown to be the legal date Capital breached the insurance contract with Industrial and Whitney. Prior to date the Capitals had taken a wait and see approach based on the question of title.

Mr. Hill contented that Industrial's property was insured by Capital Alliance and Capital Assurance at it replacement value without deduction for depreciation and showed the policy provisions. He stated that without legal fees and litigation expenses his losses still exceeded the $148,000.00 jury award by $527,000.00 (Vol. 2-250). The conversion claim, under Alabama law, was based on a different asset value standard. Clearly, Industrial was never made whole nor compensated for its total replacement value damages without deduction for depreciation. In spite of the factual contentions, the Trial Court granted Summary Judgment Without Opinion even though the breach of contract was clearly and conclusively shown. Thereafter, the Alabama Supreme Court Affirmed Without Opinion. Industrial requested a rehearing alleging in pertinent part:

Based upon the above and foregoing, Industrial

Technologies, Inc. and Richard O. Hill, Sr., respectfully request a rehearing pursuant to Rule 40, *ARAP*.

F. THE MATERIAL ARGUMENTS BELOW FOR REHEARING

1. A valid contract was entered into between Industrial and Capital on or about January 27, 1996, annual premiums were paid by Industrial and a covered event arose on or about June 26, 1996. Industrial paid the insurance premiums through the date of loss. The last premium paid was for the entire 1996 year during which time the loss occurred. Industrial fully complied with the contract terms and notice provisions of the annual insurance policy issued by Capital on January 27, 1996. An event occurred on or about June 26, 1996, notice was given without objection and a complete statement of claim occurred on May 4, 1998. This was within the legal statute of limitations period.

2. Any alleged failure of notice, failure of a condition precedent as to contract conditions, including failure to execute any sworn proof of loss on Capital Alliance's forms were waived where said defenses were not affirmatively pled by Capital Alliance. Moreover, the Capitals failed to allege various affirmative defenses in its denial of the claim and failed to assert them in its Answer. The original Third Party Complaint in this action was filed on August 30, 2002 (Vol. 1-99) after the claims were denied on August 14, 2002. The original Answer of Capital Alliance Insurance Company was filed on October 3, 2002 (Vol. 1-115-116). No where in the Answer did Capital state the affirmative defenses of (a) failure of conditions precedent;(b) failure of notice and/or a delay in notice in failing to comply with the contracts terms; (c.) nor failure of any condition precedent including executing a sworn proof of loss. Moreover, they had never mentioned these issues in the

discussions.

The Capital Assurance Response was filed on October 3, 2002 (Vol. 1-117-118). It sets forth no properly averred affirmative defenses to the contract claims on behalf of the Capitals. Moreover, since no denial of the claim was made by Capital within sixty (60) days from May 4, 1998, (the completed claim date) or at the time of the claim denial (on August 14, 2002), the statutes of limitations had not expired. The Alabama Supreme Court has so held. See *Robinson v. Morris*, 352 So.2d 1355, 1357 (Ala. 1977)... *Wallace v. Alabama Ass'n of Class. School Emp.*, 463 So.2d 135, 136, 137 (Ala. 1984). See also *Patterson v Liberty National Life Ins. Co.*, 2004 WL 2418070 (Ala. Oct. 29, 2004).

Additionally, Rule 9(c), *ARCP*, requires matters pertaining to conditions precedent to be pled specially which Capital failed to do in its Answer. Moreover, Industrial filed a Motion in Limine requesting that any such affirmative defenses be stricken or prohibited from use (Vol. 2-263). Industrial did all it was supposed to do in order to bar and prohibit any such defenses.

3. The Capitals are estopped from arguing laches, statute of limitations, unclean hands and judicial estoppel.

It is also clear that Capital through its counsel represented to Industrial that any decision on coverage after the notice was provided would be reserved until there was a judgment rendered on the declaratory judgment action filed by Jacobs against Industrial concerning the title to the equipment insured under the policy. Industrial in good faith relied upon these representations. The Alabama Supreme Court has held: "One who seeks equity must do equity, and one that comes into equity must come with clean hands. --*J & M Bail Bonding Co. V. Hayes*, 748 So. 2d 198 (Ala 1999)...--*Jamison, Money, Farmer & Co., P.C. v. Standeffer*, 678 So. 2d 1061." Industrial, just as Capital wished, waited for

the jury verdict and then noticed Capital that the declaratory judgment (title) issue was resolved in Industrial's favor in accordance with its reliance on Capital's consistent wishes. An estoppel must be found.
4. Judicial estoppel does not exist here. Industrial has not taken any inconsistent position and has not deliberately manipulated the courts. There were no substantially similar parties, issues or facts before the court in the Jacobs case and this case. The contract of insurance covered the equipment property for its replacement value without deduction for depreciation, rather than market value as in conversion law issues being decided in the Jacobs case. Moreover, not only were the claims in the Jacobs' action and this action different, there was no substantial identity between the parties. The issues and facts in controversy in the Jacobs action and this action were vastly different. Therefore, Capital cannot meet the elements of *res* judicata, nor judicial estoppel.

In the case at trail level Industrial clearly demanded a contract benefit in either paying or defending the Whitney claims, which benefit was denied on August 14, 2002, by a breach clearly within the statute of limitations of six (6) years. Capital paid no claim nor offered to reimburse Industrial for litigation expense and attorney fees. Capital failed to offer any replacement value coverage without deduction for depreciation over the conversion damage assessment of the Jacobs jury. There is no double recovery in this case and the Capital's have waived all defenses in this case.

The Affidavit of Richard Hill sets forth his replacement value damages, together with appraisals. (Vol. 2-249, 250). The evidence before the Court at the time of the Summary Judgment clearly stated that Hill's replacement value damages exceeded the compensatory damage award by approximately $500,000.00. Although it may be contested by Capital, a jury must make this

determination under appropriate instruction from the trial court. Moreover, the punitive damage assessment in *Jacobs* could not be utilized under any subrogation or double recovery concept under Alabama law. *Powell v. Blue Cross and Blue Shield of Alabama*, 581 So.2d 772 (Ala. 1990) at page 778 thereof, states as follows:

"[6] This holding requires calculation and comparison of two amounts (1) the amount of the plaintiff's total loss and (2) the total amount that the plaintiff receives in compensation for that loss. The determination of what the plaintiff's loss is and whether he has been made whole for that loss, is a question of fact. Calculation of the plaintiff's loss requires the finder of fact to consider all elements of that loss, including, but not limited, damage to property, medical expenses, pain an suffering, loss of wages, and disability. Because punitive damages are not an element of compensation, they cannot be included in the calculation of the plaintiff's loss..."

6. Based upon the above and foregoing the bad faith claim was clearly appropriate as any alleged defenses which could have supported a denial of the contract claim were waived; and the statute of limitations does not apply, therefore, Capital's breach was without legal justification and the bad faith claim of Industrial was meritorious.

Moreover, breach of the insurance contract, whether as to the 1993 claim or the 1996 claim, could not have occurred sooner than July, 1998 (60 days following the sworn statement requested by the Capitals) and did not occur until the denial of coverage on August 14, 2002. Since the 1993 alleged claim was never denied and the 1996 claim was based on the May 4, 1998, statement, each alleged claim was filed within the statutory period. The limitations period was six years. Therefore, there was no statute of limitations bar to any Industrial claim.

Since the statute of limitations did not apply there was no defense to the breach of contract that can be asserted by the Capitals.

7. Alternatively, and without waiving any arguments, Industrial respectfully submits that the notice was timely in light of any delays caused by the Jacobs litigation, its mediation process and a Petition for Writ of Mandamus filed in the Circuit Court of Jackson County, Case CV-02-203.

8. Capital breached its duty to pay or defend. The Alabama Supreme Court has held:

"[6] Under the present Alabama rules of procedure, it is quite possible that the character of the plaintiffs' claim against Ladner may change, as Judge Hand noted, even during the course of the trial; and, of course, the plaintiffs' complaint may be amended even after the evidence is in to conform to that evidence because that is so, the insurers should be mindful that:

"It is clear that where a claim potentially may become one which is within the scope of the policy, the insurance company's refusal to defend at the outset of the controversy is a decision it makes at its own peril ..." *Cadwallader v. New Amsterdam Casualty Co.*, 396 Pa. 582, 152 A.2d 484, 488 (1959) *Bandy v. Avondale Shipyards, Inc.*, 458 F.2d 900 (5th Cir. 1972)." Ladner & Co., Inc. V. Southern Guaranty Ins., Ala., 347 So.2d 100, 104 (Ala. 1977).

The duty to pay or defend was clearly inserted in the policy undisputedly by the 1996 policy issue (at the time of loss). Industrial in the sworn proof of loss requested all benefits available under the policy (which included the duty to pay or to defend). Therefore, Capital's wait and see approach was at its own peril and should be at its expense. Since a clear right to relief is shown, the

denials without opinion violated United States Constitutional principles.

9. The constitutional rights of Industrial were deprived under the Fourteenth Amendment to the United States Constitution where the Trial Court and the Supreme Court each issued no opinion Orders denying relief and without setting forth a factual basis for denial of Industrial's claim for damages that proximately caused a loss of its property interest.

A. The no opinion summary judgment decision of the trial court and the no opinion affirmance on appeal violates Industrial's rights under the due process clause of the Fourteenth Amendment to the United States Constitution, because it renders the appeal ineffective for due process purposes and the decision is not supported by the record.

"Where the record does not support the judgment - due process is implicated and the judgment is void." *Vachon v New Hampshire., 414 U.S. 478, 94 S.Ct 664, 38 L.Ed 2d 666 (1974). See also application in a civil proceeding* Zenith Radio Corp. V. Matsushita Electric Industrial Co., LTD, et. al., 723 F.2d, 238, 304.

In the present case an insurance contract is clearly shown between the parties; the January 27, 1996 to January 27, 1997 contract insured Industrial property; a claim was filed and denied. Based upon facts previously stated, the loss occurred in June 1996, notices were given in 1996, 1997, and 1998, a sworn proof of loss occurred in May 1998, no denial of the claim occurred until August 14, 2002 after all appropriate notices were made and Industrial complied with policy requirements, all of which clearly fell within the six (6) year limitations period. The record does not support the no opinion judgment.

B. The no opinion denials of Industrial's property

interest claim was tantamount to the denial of a remedy to Industrial and/or access to the courts contrary to the Fourteenth Amendment due process clause of the United States Constitution. See Boddie v. Connecticut 401 U.S. 371, 91 Sup.Ct. 780, 28 L Ed 2d 113 (1971); United States v. Kras 409 U.S. 434, 93 S. Ct. 631, 34 L Ed 2d 626, (1973); Although Court access generally follows the fair trial decisions *Marshall v. Jerrico Inc.*, 446 U.S. 238, 100 Sup.Ct 1610, 64 L ed 2d 182 (1980) and In Re Murchison 349 U.S. 133 75 Ct. 623, there need not be proof of intentional conduct. See *McCray v. Maryland* 456 F.2d 1, (4th Cir 1972). In the present case, the combination of a factually unsupported summary judgment order and the lack of a stated factual evaluation as to the evidence at trial and on appeal is alleged by Industrial to be tantamount to a denial of constitutional fair trial requirements, reasonable access to the courts and/or the denial of a remedy, all contrary to the due process clause of the Fourteenth Amendment to the United States Constitution.

C. The no opinion denials of Industrial's property interest claim is tantamount to the denial of Industrial's right to a jury trial as a remedy and the right of appeal as a remedy enjoyed by all other "persons" in the State of Alabama alleging similar property interest claims and similarly situated as to the facts of this case, contrary to the equal protection clause of the Fourteenth Amendment to the United States Constitution. See Plyer v. Doc 457 US. 202, 102 S Ct. 2382, 72 L Ed 2d 786 (1982) : F.S. Royster Gu Co v. Virginia 253 U.S. 412, 40 S Ct. 560, 64 L Ed 898 (1920) Hayes v. Missouri 120 U.S. 68, 7 S Ct. 350, 30 L Ed 578 (1987). In the present case, Industrial is aware that the Supreme Court remains ultimately responsible for upholding the law and providing appropriate judicial procedures for access to the Courts under the law of Alabama. However, the Court's alleged upholding of the law applicable to a set

of facts shown or found must not amount to a substitution of its views for that of a jury when to do so would be the effective denial of a right to a trial by jury or some other entitlement under the law. Connell v. Sears Roebuck & Co. 722 F.2d 1542 (5th 1983). In this case, the constitution and laws of the State of Alabama clearly grant the right to trial by jury to those similarly situated. See Article 1 § 11 Constitution of Alabama 1901; Article 1 § 13 Constitution of Alabama 1901; and 12-22-40 and 41 Code of Alabama 1975. Since Alabama grants such rights to all persons, such as Industrial, as are similarly situated, the no factual based order granting the Motion for Summary Judgment to Capital, and the no-opinion order of the Supreme Court, under the facts of this case, has denied Industrial equal protection of the laws enacted by the State of Alabama, contrary to the Fourteenth Amendment to the United States Constitution.

D. The trial court's granting of a summary judgment to third party defendant Capital without opinion, coupled with the Supreme Court's application of Rule 53(a)(1) and 53(a)(2)(f), *Alabama Rules of Appellate Procedure,* and its affirmance without opinion constitutes the denial of a remedy for the enforcement of the obligations of contract owed by Capital to Industrial under the 1992-1993 policy, in violation of the "contract clause" of the United States Constitution, Article I, Section 10, Clause 1.

The Application for Rehearing was denied by the Alabama Supreme Court, again, without opinion on February 11, 2005. Hence the Petition for Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

An insurance contract and breach by the insurance companies Respondent has clearly been established under Alabama law, but no opinion orders have

unconstitutionally denied relief. The undisputed evidence shows that a valid contract of insurance existed between Industrial (Petitioner herein), the Bank of Prattville and Capital Alliance (Respondent herein) during 1992, and on June 26, 1996. Furthermore, an insurance contract was issued, executed and a coverage premium was paid by Industrial for the property insured at all times during the period from 1992, to January 27, 1997. Moreover, an insured event occurred on or about June 26, 1996. The foregoing facts were established as a matter of certainty. Petitioner contends that any alleged failure of notice, or failure of any other alleged condition precedent, is without legal justification and, in any event, were waived where notice of the reasons for a claim denial were not given within a reasonable time following a May 4, 1998, complete and thorough sworn statement of claim. The Capitals asserted issue of delayed notice does not help them. Any alleged delayed notice was reasonable under the circumstances in that such alleged delays were only based on the conduct of the Capitals. Since these contentions are either uncontradicted or supported by substantial evidence, they are subject to jury decision under Alabama law, and a summary judgment was, therefore, improperly entered in favor of the Capitals.

THE UNITED STATES CONSTITUTION CLAIMS

The constitutional rights of Industrial were deprived under the Fourteenth Amendment to the United States Constitution when the trial court and the Supreme Court of Alabama issued orders failing to set out a factual basis for the court's denial of Industrial's claims for damages that proximately caused a loss of its property interest. The no opinion summary judgment decision of the Trial Court and the no opinion affirmance on appeal violates Industrial's rights under the due process and equal

protection clauses of the Fourteenth Amendment to the United States Constitution, and render the appeal ineffective for due process purposes, because:

First, the no opinion denials of Industrial's property interest claim were not supported by the record and constitutes a denial of Industrial's right to due process of law contrary to the Fourteenth Amendment to the Untied States Constitution. *Vachon v. New Hampshire*, 414 U.S. 478, 94 S. Ct. 664, 38 L.Ed 2d 666, (1974) and *Zenith Radio Corp v. Matsushita Electric Industrial Co. LTD, et al*, 723 F2d 238, 304.

In the present case, an insurance contract is clearly shown obligating the parties. The January 27, 1996 to January 27, 1997 contract insured Industrial property that was then subjected to litigation claims of Jacobs Bank; which claims were known to the Capitals in 1993 (1992-1993 policy renewal) and at the time the 1996 policy was issued; the 1996-1997 policy insured the Jacobs litigation property for its replacement value without deduction for depreciation; a premium was paid for all coverage terms and for benefits insured from January 27, 1996 to January 27, 1997; the Court Order of the Jackson County Circuit Court during June 1996 and/or the Jacobs Order in 2001 terminated any legal justification for the Jacobs Bank possession of insured property and set the date for a claim of wrongful conversion. Moreover, wrongful conversion admittedly was a covered claim under each policy between Industrial and Capital from 1992-1997; notice of the Jacobs contract issues and contentions were given to Capital on July 1, 1993, May 1997, January 28, 1998, May 4, 1998 and April 15, 2002. Since the destruction and conversion event occurred in June 1996, and was followed by notices to Capital, without objection, and a sworn proof of claim filed on May 4, 1998, the final denial of the claim without reciting a contract basis or a contract defense by Capital on August 14, 2002, (well

within the six (6) year statute of limitations term beginning not earlier than May 4, 1998) is not only a breach of contract but, if considered as a separate matter, constitutes a waiver of all notice and condition precedent defenses. Therefore, the Trial Court's Form Order granting Capital's Motion for Summary Judgment on January 26, 2004, and February 12, 2004, combined with the Supreme Court's No Opinion Affirmances of said order constitutes a judgment of judgments entered that is not supported by the record of trial proceedings, in violation of Industrial's right to due process of law under the Fourteenth Amendment to the United States Constitution. See *Vachon v. New Hampshire*, and *Zenith Radio Corp. V. Matshrahita Electric Industrial Co. LTD, supra.*

Secondly, the no opinion denials of Industrial's property interest claim was tantamount to the denial of a remedy to Industrial and/or access to the courts contrary to the due process clause of the United States Constitution. See Boddie v. Connecticut 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed 2d 113 (1971); United States v. Kras, 409 U.S. 434, 93 S.Ct. 631, 34 L.Ed 2d 626 (1973). Although court access issues generally follows fair trial decisions such as Marshall v. Jerrico Inc., 446 U.S. 238, 100 S.Ct. 1610, 64 Led 2d 182 (1980) and In Re Murchison 349 U.S. 133, 75 S.Ct. 623, there need be no proof of intentional conduct. See McCray v. Maryland, 456 F.2d 1, (4th Cir. 1972). In the present case, the combination of a no opinion affirmance of a factually unsupported summary judgment order and the lack of a stated factual basis as to the weight of the evidence at trial and on appeal is alleged by Industrial to be tantamount to a denial of constitutional fair trial requirements, its reasonable access to the courts and/or the denial of a remedy, all contrary to the due process clause of the Fourteenth Amendment to the United States Constitution. Moreover, as to an officials

contention that one complies only with otherwise reasonable policies, commands or rules, Industrial submits that such contentions are not effective to avoid a violation, where the act has a coercive effect as to due process rights. Lombard v. Louisiana, 373 U.S. 267, 83 Sup.Ct. 1122, 20 L.Ed 2d 338 (1963).

Third, Industrial also contends that the no opinion denials of Industrial's property interest claim is tantamount to the denial of Industrial's right to a jury trial, a remedy, and the right of appeal, also a remedy, enjoyed by all other "persons" in the State of Alabama alleging similar property interest claims and similarly situated as to the facts of this case, all contrary to the equal protection clause of the Fourteenth Amendment to the United States Constitution. See Plyer v. Doe, 457 U.S. 202, 102 S.Ct. 2382, 72 Led 2d 786 (1982); F.S. Royster Guao Co. V. Virginia, 253 U.S. 412, 40 S.Ct. 560, 64 L.Ed 98 (1920); Hayes v. Missouri, 120 U.S. 68, 7 S.Ct. 350, 30 L.Ed 578 (1887).
See also Connell v. Sears Roebuck & Co. 722 F.2d 1542 (5th 1983).

In this case, the Constitution and law of the State of Alabama clearly grants the right to trial by jury, the right to a just remedy and right to appeal to all persons similarly situated. See Article 1 § 11, Constitution of Alabama 1901; Article 1 § 13, Constitution of Alabama 1901; and 12-22-40 and 41 Code of Alabama, 1975. Since Alabama grants such rights to all persons, such as Industrial, that are similarly situated and no factual basis for the orders granting the Motion for Summary Judgment to Capital is given, which can distinguish Industrial's prima facie claim, the No Opinion Order of the Supreme Court has denied Industrial equal protection of the laws enacted by the State of Alabama, contrary to the Fourteenth Amendment to the United States Constitution. This is so because, as stated in all preceding arguments, there (at the least) was such

substantial claims and evidence presented to the Trial Court below that reasonable people (the contract jurors), in the exercise of impartial judgment, might reach different conclusions on such issues as claims of reasonable delays in notice, waiver of contract conditions and/or contract damage amounts, where, as here, Industrial made a jury trial demand (C. 100). A jury trial of right existed and right of appeal existed here, which is granted to all persons raising such issues and similarly situated to Industrial in proceedings granted as of right by the State of Alabama.

Fourth, the Trial Court's granting of a summary judgment to Third-Party Defendants, the Capitals, without opinion, coupled with the Supreme Court's application of Rule 53(a)(1) and 53(a)(2)(f), *Alabama Rules of Appellate Procedure*, (a qualified legislative act) and its affirmance without opinion (if it is found that the 1992-1993 contract is at issue) constitutes the denial of a remedy for the enforcement of the obligations of contract owed by Capital to Industrial under the 1992-1993 policy in violation of the "contract clause" of the United States Constitution, Article 1 § 10, Clause 1.

In the present case, Industrial first gave notice of an alleged act or action taken by Jacobs Bank in April 1993 to legally assert control over property insured by Capital to Industrial and the Bank of Prattville. This notice was given on June 28, 1993. In so far as Capital contends that the Jacobs acts constituted a wrongful conversion upon which the six (6) years statute of limitations can be asserted as a defense to a breach of contract claim brought under the 1992-1993 policy, Industrial submits that; (1) the actions of Jacobs affected insured property under a contract policy covering a period beginning in the year 1992; (2) that such contract coverage and coverage period was prior to the adoption of Rule 53(a)(1) and 53(a)(2)(f), *Alabama Rules of Appellate Procedure* (1993), (3) that Rule 53(a)(1) and 53(a)(2)(f) constitutes a

qualified legislative act under the contract clause of the United States Constitution; (4) that a jury question of waiver, or concerning obligations upon which the contract was breached existed (i.e., 1992 to 1993), (5) that a jury question existed as to whether Capital, by continuing the claim investigation for a title decision, breached the 1992-1993 insurance contract on January 28, 1998, or on August 14, 2002. (Both within six (6) years of April 1993); (6) that the May 4, 1998, Proof of Claim after request could be a completed and valid proof of a timely claim under the 1992-1993 policy provisions (7) that the May 4, 1998, proof of a timely claim was not affirmatively denied until August 14, 2002, and in no event, could be construed as denied prior to the May 4, 1998, (the requested Proof of Claim date). Thereafter, a breach issue and jury question existed as to such denial and breach of the 1992-1993 policy). The lack of findings shown by the Summary Judgment Order and the Affirmance of Appeal Order (Without Opinion) in the Supreme Court, through the application of Rules 53(a)(1) and 53(a)(2)(f), *Alabama Rules of Appellate Procedure*, constitutes a denial of a remedy to Industrial for the enforcement of valid obligations of contract owed from Capital to Industrial, under the 1992 policy, and thereby impaired the obligations of contract contrary to the contract clause of the United States Constitution, Article 1, Section 10, Cl.1. See E & E Hauling, Inc. vs. Forest Preserve District, 613 F.2d 675 (7th Cir. 1980); New Orleans Waterworks Co v. Louisiana Sugar Refining Co. 125 U.S. 18 S.Ct. 741 31 L.Ed 607 (1888).

Therefore, even if the Alabama Courts considered the 1992-1993 contract as being the only contract at issue, a constitutional violation has still occurred.

CONCLUSION

In conclusion, Petitioner requests the Court to

accept the Petition for Certiorari, reverse the decision of the Supreme Court of Alabama and remand the case for trial on the merits.

Respectfully submitted,

Donald G. Madison

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Attorney for Petitioner
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(334) 263-4800
JULY 14, 2005

IN THE CIRCUIT COURT OF
AUTAUGA COUNTY, ALABAMA

WHITNEY NATIONAL BANK,	*	
	*	
PLAINTIFF,	*	
	*	
V.	*	CASE NO. CV-02-194
	*	
RICHARD O. HILL, et. al.,	*	
	*	
DEFENDANTS.	*	

ORDER

This matter was called for pretrial hearing and hearing on pending motions for summary judgment. All parties were represented by their respective counsel of record and the Court heard the arguments of counsel both in support of and in opposition to the subject motions. After careful consideration of the motions for summary judgment and the responses thereto, together with the arguments of counsel, the Court hereby ORDERS as follows:

1. That Plaintiff, Whitney National Bank's motion for summary judgment is well taken and is hereby granted and judgment is entered in favor of the Plaintiff and against the Defendants, Richard O. Hill and Industrial Technologies, in the amount of $203,836.20 plus costs for which execution may issue.

2. That Defendant Capital Assurance Company and Defendant Skandia Reinsurance Corp. Are hereby dismissed as party Defendants.

3. That Counter-Defendant, Whitney National

Bank and Defendant, Capital Assurance Insurance Company's motions for summary judgment are due to be and are hereby granted.

4. That the entry of this Order is intended to dispose of all claims, issues and parties and is a final Order in this case.

ORDERED this, the 26th day of January, 2004.

BEN A. FULLER,
Circuit Judge

IN THE CIRCUIT COURT OF
AUTAUGA COUNTY, ALABAMA

WHITNEY NATIONAL BANK,	*	
	*	
PLAINTIFF,	*	
	*	
V.	*	CASE NO. CV-02-194
	*	
RICHARD O. HILL, et. al.,	*	
	*	
DEFENDANTS.	*	

AMENDED ORDER

It is hereby ORDERED that paragraph 3 of this Court's Order entered in the above-styled case on January 26, 2004, is hereby amended as follows:

1. That Counter-Defendant, Whitney National Bank and Defendant, Capital Alliance Insurance Company's motions for summary judgment are due to be and are hereby granted.

The Clerk shall notify all counsel of record.

ORDERED this 12th day of February, 2004.

BEN A. FULLER
CIRCUIT JUDGE

A-4

RELEASED

DEC 17 2004

CLERK
SUPREME COURT OF ALABAMA

STATE OF ALABAMA -- JUDICIAL DEPARTMENT
THE SUPREME COURT
OCTOBER TERM, 2004-2005

1031438

Industrial Technologies, Inc. v. Capital Alliance Insurance Company, Inc., and Capital Assurance Company, Inc.
Appeal from Autauga Circuit Court, CV-02-194

LYONS, Justice

AFFIRMED. NO OPINION.

See Rule 53(a)(1) and (a)(2)(F), Ala. R. App. P.

Nabers, C.J., and Houston, Johnstone, and Woodall, JJ., concur.

IN THE SUPREME COURT OF ALABAMA

February 11, 2005

1031438
Industrial Technologies, Inc. v. Capital Alliance Insurance Company, Inc. and Capital Assurance Company, Inc. (Appeal from Autauga Circuit Court: CV-02-194).

ORDER

The application for rehearing filed in this cause is overruled.

LYONS, J. - Nabers, C.J., and Woodall, Smith, and Parker, JJ., concur.

I Robert G. Esdale, Sr., as Clerk of the Supreme Court Of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court. Witness my hand this 11th day of February, 2005.

Robert G. Esdale, Sr.
Clerk, Supreme Court of Alabama

Code of Alabama, 1975, as Amended

§ 6-2-34. Commencement of actions -- Six years.

The following must be commenced within six years:

(1) Actions for any trespass to person or liberty, such as false imprisonment or assault and battery;

(2) Actions for any trespass to real or personal property;

(3) Actions for the detention or conversion of personal property;

(4) Actions founded on promises in writing not under seal;

Code of Alabama, 1975, as Amended

§ 10-2B-11.06. Effect of merger or share exchange.

(a) When a merger takes effect:

(1) Every other corporation party to the merger merges into the surviving corporation and the separate existence of every corporation except the surviving corporation ceases;

(2) The surviving corporation thereupon and thereafter possesses all the rights, immunities, and franchises, of a public as well as of a private nature, of every corporation party to the merger; and all property, real, personal and mixed, and all debts due each of the corporations so merged, are taken and deemed to be transferred and vested in the surviving corporation without further act or deed; and title to any real estate, or an interest therein, vested in any of such corporations shall not revert nor in any way be impaired by reason for such merger;

(3) The surviving corporation shall be responsible and liable for all the liabilities and obligations of each corporation party to the merger; and neither the rights of creditors nor any liens upon the property of any corporation party to the merger shall be impaired by the merger;

(4) An claim existing or action or proceeding pending by or against any corporation party to the merger may be prosecuted, or continued, as if the merger had not taken place, or the surviving corporation may be substituted in the action or proceeding for the corporation whose existence ceased;

Alabama Rules of Civil Procedure

RULE 56. SUMMARY JUDGMENT

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of thirty (30) days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof;

(b) For Defending Party. A party against whom a claim, counterclaim or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(3) *Judgment.* The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgement as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

Alabama Rules of Civil Procedures

RULE 9. PLEADING SPECIAL MATTERS

(c.) Conditions Precedent. In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity.

Alabama Rules of Appellate Procedure

RULE 53. OPINIONS AND "NO OPINION" CASES OF THE SUPREME COURT AND THE COURT OF CIVIL APPEALS

(a) Affirmance Without Opinion. The Supreme Court or the Court of Civil Appeals may affirm a judgment or order of a trial court without an opinion if the court determines:

(1) That an opinion in the case would serve no significant precedential purpose; and

(2) That one of the following circumstances exists:

(A) The judgment or order appealed from is based on findings of fact that are not clearly, plainly, or palpably erroneous;

(B) The evidence adequately supports the jury verdict on which the judgment or order is based;

(C.) In a nonjury case in which the judge has made no specific findings of fact, the evidence would support those findings that would have been necessary to support the judgment or order;

(D) The order of an administrative agency is sufficiently supported by the evidence in the record;

(E) The appeal is from a summary judgment, a judgment on the pleadings, or a judgment based on a directed verdict, and that judgment is supported by the record; or

(F) The court, after a review of the record and the contentions of the parties, concludes that the judgment or order was entered without an error of law.

Supreme Court, U.S.
FILED
AUG 19 2005
OFFICE OF THE CLERK

No. 05-108

IN THE

Supreme Court of the United States

INDUSTRIAL TECHNOLOGIES, INC.,

Petitioner,

v.

CAPITAL ALLIANCE INSURANCE COMPANY and CAPITAL ASSURANCE COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

Respondents, Capital Alliance Insurance Company, Inc. and Capital Assurance Company, Inc. are wholly owned by Skandia America Corporation.

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INTRODUCTION

Respondents, Capital Alliance Insurance Company and Capital Assurance Company, hereinafter "Respondents" or "Capital Alliance," file this response to the petition for writ of certiorari filed by Industrial Technologies, Inc., hereinafter "Industrial." For reasons outlined herein, Respondents assert that this Court does not have jurisdiction to review the Alabama Supreme Court's order affirming summary judgment in favor of Respondents. Additionally, Respondents submit that the proceedings in the state court were not in violation of Industrial's constitutional rights.

STATEMENT OF JURISDICTION

Respondents respectfully assert that Industrial does not present any issue invoking this Court's jurisdiction. This Court's Rules 10(b) and 10(c) both identify circumstances under which this Court may opt to issue a writ of certiorari. Both rules refer to instances where a state court of last resort has "decided an important federal question." Additionally, under 28 U.S.C. § 1257(a):

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where . . . any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

A prerequisite under all of these cited authorities is a decision from the highest state court deciding a question of federal or Constitutional law. The Supreme Court of Alabama did not decide a question of Constitutional law and did not rule on

any federal questions. Industrial did not assert any Constitutional claim or issue in the trial court or in its appeal to the Alabama Supreme Court. Industrial raised the issue of the Constitutionality of the "no opinion" orders of the trial court and the Alabama Supreme Court for the first time in an Application for Rehearing before the Alabama Supreme Court. As discussed in the Argument below, this was insufficient to preserve any Constitutional issue and, in any event, the Alabama Supreme Court's decision to uphold summary judgment and deny the application for rehearing is based on adequate independent state law grounds. This Court thus has no statutory basis for exercising jurisdiction to review that court's decision.

STATEMENT OF THE CASE

A. Statement of the Facts

This action was initiated by Whitney National Bank in the Circuit Court of Autauga County, Alabama, on July 2, 2002. (C. 12 and 13). This action was based on a note between Whitney National Bank's predecessor in interest, the Bank of Prattville, Richard O. Hill and Industrial Technologies, Inc., which was executed on March 20, 2001. (C. 12-14). The appeal against Whitney National Bank has been dismissed. For the sake of brevity, all further references to "plaintiffs" or petitioner are to third party plaintiffs Industrial Technologies and Hill. All further references to "defendants" are to third party defendants Capital Alliance Insurance Company, Inc., Capital Assurance Company. (No appeal was filed as to third party defendant Skandia America Reinsurance Company).

Defense counsel responded to plaintiff's attorney's telefacsimile letters [which are not part of the record on appeal] by letter dated August 14, 2003. In said letter, plaintiff

was advised that the Whitney Bank litigation would not be defended by Capital Alliance. (C. 814). One reason for the denial, inter alia, was that the insurance contract expired by its own terms at 12:01 a.m., January 28, 1997, and the Whitney contract was not executed until March 20, 2001. (C. 207, 393-395).

Mr. Hill and Industrial Technologies, Inc. filed a third party complaint against Capital Alliance Insurance Company, Inc., Capital Assurance Company, Inc. and Skandia America Reinsurance Corporation on or about August 30, 2002. (C. 82-101).

The defendant, Capital Alliance Insurance Company, Inc., did issue a series of insurance policies to Industrial Technologies. Capital Alliance has never had a policy with Richard Hill. The last insurance policy that Capital Alliance issued to Industrial Technologies, Inc. expired by its own terms at 12:01 a.m. on January 28, 1997, and was not renewed. (C. 207). Capital Assurance and Skandia have never had an insurance policy issued to the petitioner.

Mr. Hill and Industrial Technologies executed two documents titled, "Assignment of Insurance Proceeds/Rights in and to Proceeds" and "Amendment to Assignment of Insurance Proceeds/Rights in and to Proceeds Agreement," which purport to transfer all their rights in the insurance policies to Whitney National Bank. (C. 419-423). Although the plaintiffs have pled that this was rejected by Whitney Bank, there is no written document in the record which reflects such rejection, nor a withdrawal or cancellation of the assignment by Industrial Technologies and Hill. This purported transfer of rights violates the terms of the policy and bars recovery. (C. 628). *See Jones v. Crawford*, 258 Ala. 278, 62 So. 2d 221 (1952).

In the third party complaint, Richard O. Hill and Industrial Technologies, Inc. acknowledged that they had been involved in certain litigation with Jacobs Bank since 1993, involving the ownership and eventual destruction of certain equipment, which was insured by the third party defendant, Capital Alliance. (C. 88). The insurance policy in effect in 1993 was a commercial property policy and had no coverage for litigation expenses nor a duty to defend. (C. 393-395). (*See also* Appellant's corrected brief, pp. 21-22).

The lawsuit between Jacobs Bank and Industrial Technologies (Richard Hill was dismissed) was tried the week of December 3, 2001. The Jackson County jury returned a verdict in favor of Industrial Technologies, and against Jacobs Bank for compensatory damages in the amount of $148,000.00, interest in the amount of $82,310.00 and punitive damages in the amount of $250,000. (C. 88-89 and 809-812). Circuit Judge Randall Cole set aside the award of punitive damages and the case was appealed. (C. 808-812).

After appeal, the Honorable Judge Randall Cole entered a judgment in *Jacobs Bank v. Industrial Technologies, Inc.*, et al., CV1992-203 in favor of Industrial Technologies in the amount of $480,310.00 plus accrued interest on November 19, 2003. (C. 424-25). A satisfaction of judgment was filed with the Jackson County Circuit Clerk's office on January 6, 2004. The defendants requested that the Alabama Supreme Court take judicial notice of that satisfaction of judgment.

THE INSURANCE POLICIES

The insurance policy which was in effect at the time Jacobs Bank filed suit against Industrial Technologies was in force from July 21, 1992, to July 21, 1993. (C. 563-576). The policy requires that:

> The insured shall give immediate written notice to this company of any loss, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, furnish a complete inventory of the destroyed, damaged, and undamaged property, showing in detail quantities, costs, actual cash value and amount of lost claims; and within sixty days after the loss, unless such time is extended in writing by this company, the insured shall render to this Company a proof of loss, signed and sworn to by the insured [. . .].

(C. 564). The policy further states that the amount of the loss for which the company,

> may be liable shall be payable sixty days after the proof of loss, as herein provided, is received by this Company and an ascertainment of the loss is made either by agreement between the insured and this Company expressed in writing or by the filing with this Company of an award as herein provided.

Id.

"No suit on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless all the requirements of this policy shall have been complied with, and unless commenced within twelve months next after the inception of the loss." (C. 564). Further the policy provides,

"This company may require from the insured an assignment of all right of recovery against any party for loss to the extent that payment therefore is made by this Company."

In addition to requiring a written sworn proof of loss, the policy states, "The insured, as often as may be reasonably required, shall exhibit to any person designed by this Company all that remains of any property herein described, and submit to examinations under oath by any person named by this company and subscribe to same; . . ." (C. 564).

Regarding notice, the Appellant claims that he put Capital Alliance on notice of a claim in the summer of 1993. There is a letter regarding two pieces of missing machinery, a Lagun Milling Machine and a Hardness Testing Machine. (C. 662). The final communication concerning those two pieces of missing machinery is dated May 11, 1994, which was a telefacsimile from Fred Gouge of Capital Alliance to Mr. Richard Hill requesting that he call regarding the loss. (C. 413). Apparently, Mr. Hill did not respond because those two pieces of equipment had re-appeared. (C. 716). Mr. Hill did not attempt to speak to anybody at Capital Alliance until February, 1998. (C. 732, 755-56). This conversation took place after plaintiff's counsel sent a letter to Tom Jones Insurance in Tuscumbia, Alabama, with a copy to "Al Garcia, Skandia". (C. 682-683). That letter explained:

> No claim was made on the insurance policy previously as a result of the fact that Industrial Technologies, Inc. and Richard Hill were uncertain as a result of the litigation as to what would be included in the damages which Industrial Technologies, Inc. and Richard Hill were awarded and what was not covered, thereby preventing Industrial Technologies, Inc. and Mr. Hill from

> making an accurate, truthful and representative claim without duplicating any attempt for recovery on said equipment.

(C. 683). This was the stated reason for the delay in filing notice of the destruction of the equipment in 1995.

The Appellant erroneously asserted in numerous places throughout his Alabama Supreme Court brief that a sworn proof of loss was filed. (Appellant's Corrected Brief, pp. 18, 31 (two times), 44, 46 and 48). On May 4, 1998, the Appellee, Capital Alliance, acting through counsel, did take a sworn statement of Mr. Richard O. Hill. (C. 685-776). On May 18, 1998, the Appellee sent Appellants a blank sworn proof of loss. (C. 414). On June 19, 1998, the Appellee again sent the Appellant a blank proof of loss form requesting that it be completed. (C. 415-416). In that letter, it was explained that the policy required a sworn proof of loss in addition to an examination under oath. The terms of the policy clearly set forth two different obligations.

Assuming that this claim in 1998 was for the destruction of the equipment in 1995, as opposed to the conversion of the equipment which occurred in 1992 and 1993, the policy which was in effect is found in the clerk's record at 607-623. This 1995 policy also has two separate conditions precedent or obligations imposed on the insured concerning an examination under oath and providing a sworn proof of loss. (C. 623). Under the section entitled Duties in the Event of Loss or Damage, the following language is found:

> (a) You must see that the following are done in the event of loss or damage to Covered Property:
>
> (1) Notify the police if a law may have been broken.

(2) Give us prompt notice of the loss or damage. Include a description of the property involved.

(3) As soon as possible, give us a description of how, when and where the loss or damage occurred.

(4) Take all reasonable steps to protect Covered Property from further damage by a Covered Cause of Loss. If feasible, set the damaged property aside and in the best possible order for examination. Also, keep a record of your expenses for emergency and temporary repairs, for consideration in the settlement of the claim. This will not increase the Limit of Insurance.

(5) At our request, give us complete inventories of the damaged and undamaged property. Include quantities, costs, values and amount of loss claimed.

[. . .]

(7) Send us a signed, sworn proof of loss containing the information we request to investigate the claim. You must do this within 60 days after our request. We will supply you with the necessary forms.

(8) Cooperate with us in the investigation or settlement of the claim.

> (b) We may examine any insured under oath, while not in the presence of any other insured and at such times as may be reasonably required, about any matter relating to this insurance or the claim, including an insured's books and records. In the event of an examination, an insured's answers must be signed.

There is no signed proof of loss in the record, because none was ever provided by the insured to Capital Alliance.

The policy prohibits transfers of plaintiff's rights and duties under the policy. "Your rights and duties under this policy may not be transferred without our written consent except in the case of death of an individual named insured." (C. 658). Plaintiff purported to transfer its rights to Whitney National Bank. (C. 792-95).

The 1995 policy also states as follows under the Commercial Property Conditions:

> (D) LEGAL ACTION AGAINST US.
>
> No one may bring a legal action against us under this Coverage Part unless:
>
> 1. There has been full compliance with all of the terms of this Coverage Part; and
>
> 2. The action is brought within 2 years after the date on which the direct physical loss or damage occurred.

After the sworn statement in May, 1998, there was some communication concerning the Jackson County litigation.

However, there was no request to defend the Jacobs Bank suit, nor any proof of loss that was sent to Capital Alliance about the damaged equipment.

In August of 2002, a letter was sent via telefacsimile advising that Whitney Bank had filed suit against Mr. Hill and Industrial Technologies over a note which was executed in March of 2001. (This letter is not in the record). Capital Alliance did deny a defense to the Whitney Bank suit. (C. 814).

B. Procedural Facts

Whitney National Bank filed a Complaint in the Circuit Court of Autauga County, Alabama, on July 2, 2002, against Richard O. Hill and Industrial Technologies. (C. 12-13). The Respondents were not named defendants. The Complaint alleges that Whitney National Bank is the successor in interest to the Bank of Prattville, and that Richard O. Hill and Industrial Technologies, Inc. owe, "the sum of $139,150.00, together with interest in the amount of $11,433.42 at a rate of 10.75% per annum due by agreement made on March 20, 2001, and is now past due." (C. 12). Further, it demands a reasonable attorney's fee in Count I. Count II seeks execution on the security agreements to satisfy the debt. It specifically refers to described property in "Exhibit 'A'" (C. 12-13). There is no Exhibit A attached to the Complaint, although there are UCC filing statements and security agreements. (C. 27, et seq.).

The Petitioner filed an Answer and affirmative defenses on or about August 27, 2002. (C. 45-63). Richard Hill and Industrial Technologies, Inc. (hereinafter IT or Industrial Technologies) also filed a counterclaim against Whitney National Bank. (C. 64-81). On August 30, 2002, Richard Hill and IT filed a third party complaint against Capital Alliance

Insurance Company, Inc. (hereinafter Capital Alliance), Capital Assurance Company, Inc. (hereinafter Capital Assurance) and Skandia America Reinsurance Corporation (hereinafter Skandia). (C. 82-101).

Count I of the third party complaint requests a declaration of rights concerning coverage issues. Count II alleges a breach of contract on the part of the third party defendants. Count III alleges that the defendants acted in bad faith. Count IV simply alleges that if Industrial Technologies and Hill are liable to Whitney National Bank, the Capital & Skandia defendant should pay those claims.

The third party defendant Capital Alliance filed a motion to dismiss setting forth as grounds for the motion to dismiss the statute of limitations, failure to serve process properly, statute of frauds, lack of privity, laches, unclean hands and that the plaintiff had received a judgment against the third party tortfeasor Jacobs Bank. (C. 115-116). The defendants Capital Assurance and Skandia filed a motion to dismiss generally averring that the service of process was improper and ineffective. (C. 117-124). The failure of service was cured.

Hill and Industrial Technologies filed a "Motion to Add Plaintiff as Necessary Party to the Third Party Claim and/or Crossclaim of Defendants Against Third Party Defendants; or Alternatively, Motion for Realignment of Plaintiff's Claim with Defendants' Claim Against Third Party Defendant." (C. 153-160). This pleading alleges that the equipment which was destroyed by Jacobs Bank was collateral for the loan to the Bank of Prattville, Whitney National Bank's predecessor in interest. (C. 155-156). This motion also avers that Whitney National Bank, "technically is entitled to a priority or absolute payment of the claim first prior to any remaining proceeds

being paid to the defendants under the insurance policy." (C. 157). On May 13, 2003, a Motion to Dismiss and Answer was filed on behalf of all three third party defendants. (C. 181-184). This Answer adopted by reference the last policy in effect from January 28, 1996 to January 28, 1997. (C. 185-210).

The three third party defendants filed a motion for judgment on the pleadings on or about November 24, 2003. This was based on the third party plaintiff's pleading that they were not entitled to prosecute this claim, and Whitney National Bank had priority. Whitney National Bank was never realigned as an involuntary plaintiff against these three defendants. (C. 319-321).

A motion for summary judgment in favor of the three insurance defendants was filed on the 29th day of December, 2003. (C. 382-384). The supporting documents for the motion to dismiss can be found in the clerk's record, C. 385-454. The memorandum of law in support of the motion for summary judgment is found in the record at C. 455-474. The plaintiff's Memorandum of Law in Support of Response to Motion for Summary Judgment begins in the record at 475 and ends at 492. The plaintiff filed a Response to the Motion for Summary Judgment. (C. 493-497). The plaintiff's supporting documents are found at pages 498-831.

The trial court entered an order granting Whitney National Bank's motion for summary judgment and dismissing Capital Assurance Company, Inc. and Skandia Reinsurance Corporation as party defendants and the trial court incorrectly granted summary judgment in favor of Capital *Assurance* on January 26, 2004. (C. 832-834). The trial court amended its order to correctly grant the summary judgment in favor of Capital Alliance Insurance Company. (C. 845)

On June 14, 2004, the plaintiff filed a notice of appeal of the Whitney National Bank judgment and the judgment in favor of Capital Alliance Insurance Company and Capital Assurance Company, Inc. (C. 897). Skandia was not named in the Notice of Appeal. The plaintiff Whitney National Bank settled with Industrial Technologies and Richard O. Hill while the appeal was pending, and Hill and IT voluntary dismissed the appeal against Whitney National Bank. (C. 926-927). The notice of appeal was only filed against Whitney National Bank, Capital Alliance Insurance Company, Inc. and Capital Assurance Company, Inc., not Skandia (C 897).

The plaintiffs raised eight (8) issues on appeal, none of which mention either the Constitution of Alabama or the United States Constitution. The only citation to a Constitutional provision is found in the plaintiffs' Statement of Jurisdiction, which it to Article VI of the constitution of Alabama, 1901, as amended by Amendment 328, Section 6.02(b)(1) and (2). This provision generally grants the Alabama Supreme Court jurisdiction to hear the appeal.

In the Respondent's Motion for Rehearing the brief raises ten (10) issues an appeal. The additional tenth issue on appeal raises a Constitutional issue for the first time. No Constitutional issue was raised at the trial court nor in the original appeal to the Alabama Supreme Court.

REASONS FOR DENYING THE PETITION

I. This Court lacks jurisdiction to review the Alabama Supreme Court's decision to affirm summary judgment in this case, because that court did not pass upon any federal or constitutional issues.

Pursuant to Rule 28 U.S.C. § 1257(a),

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where . . . any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

This Court's cases have long held that the Court will "not decide federal constitutional issues raised here for the first time on review of state court decisions." *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969). In the present case, Industrial never raised a constitutional issue in the trial court. After the trial court entered summary judgment without opinion, Industrial filed a motion pursuant to the *Alabama Rules of Civil Procedure* asking the trial court to alter, amend, or vacate the summary judgment order. In this motion, Industrial did not bring up any federal or constitutional issues concerning the no-opinion summary judgment; rather, Industrial simply re-argued the existence of substantial evidence and the impropriety of summary judgment. After the trial court denied this motion, Industrial instituted an appeal to the Alabama Supreme Court, again making no mention of any federal or constitutional issues concerning the no-opinion order of summary judgment. When the Alabama Supreme Court affirmed the trial court's entry of

summary judgment, Industrial applied for rehearing, mentioning for the first time its belief that constitutional rights were at issue. The application for rehearing was denied without opinion.[1]

It is apparent that the Supreme Court of Alabama did not pass upon Industrial's constitutional challenge. The appellate courts of Alabama do not consider constitutional issues that were not first raised in the trial court. *Ross v. Alabama Bd. Of Chiropractic Examiners*, 724 So.2d 540 (Ala. Civ. App. 1998) ("in order for appellate court to review a constitutional issue, that issue must have been raised by the appellant and presented to and reviewed by the trial court"), citing *HealthAmerica v. Menton*, 551 So.2d 235 (Ala. 1989). See also *Continental Eagle Corp. v. Mokrzycki*, 611 So.2d 313, 322 (Ala. 1992) (constitutional challenge must have been raised in a lower court before appellate court will review it); *Campbell v. Alabama Power Co.*, 567 So.2d 1222, 1225 (Ala. 1990) (holding that issues not raised in the trial court may not be raised later on appeal); *Chatman v. City of Prichard*, 431 So.2d 532, 533 (Ala. 1983) (holding

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1. Under Alabama appellate practice, an application for rehearing is generally used to point out to the appellate court how the questions that were decided are contrary to the record, rather than to bring up new issues for the first time. "The office of an application for rehearing is to invite a re-examination of the questions decided in respect to their soundness as applied to the merits of the case as presented on appeal." *Redd Chemical & Nitrate Co. v. W.T. Clay Mercantile Co.*, 219 Ala. 478, 479, 122 So. 652, 653 (1929). "The object and purpose of an application for rehearing is to invite review by the court as to the correctness of the opinion and judgment of the court as presented on the record upon which the case is submitted." *Gossett v. Pratt*, 250 Ala. 300, 301, 34 So.2d 145, 146 (1947). The purpose of the application is not to raise new constitutional issues never presented in any prior proceedings.

that Alabama Supreme Court need not address the merits of an argument raised for the first time on appeal); *Smiths Water Authority v. City of Phenix City*, 436 So.2d 827, 830-31 (Ala. 1983) (holding that Alabama Supreme Court will not consider a theory or issue that was not pleaded or raised in the trial court); *Hutchins v. Shepard*, 370 So.2d 275, 276-77 (Ala. 1979) (holding that an issue not raised in the trial court cannot be raised for the first time on appeal).

Because Industrial presented no constitutional issues to the trial court, the trial court did not consider and rule upon any such issues. The Alabama Supreme Court therefore did not rule upon those issues (even by inference in denying the application for rehearing, which was the first place such issues were ever raised). This Court, in turn, does not have jurisdiction to review the orders of the Alabama Supreme Court. In *Webb v. Webb*, 451 U.S. 493 (1981), this Court re-affirmed this principle:

> This Court has frequently stated that when "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary." *Street v. New York*, 394 U.S. 576, 582 [] (1969); see also *Fuller v. Oregon*, 417 U.S. 40, 50, n. 11 [] (1974); *Chambers v. Mississippi*, 410 U.S. 284, 290, n. 3, [] (1973); *Bailey v. Anderson*, 326 U.S. 203, 206-207, (1945).
>
> . . .
>
> It is a long-settled rule that the jurisdiction of this Court to re-examine the final judgment of a state court can arise only if the record as a whole shows

> either expressly or by clear implication that the federal claim was adequately presented in the state system. *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 [] (1928); *Oxley Stave Co. v. Butler County*, 166 U.S. 648, 655 [] (1897).

Id. at 496-97. The Court continued:

> [T]here should be no doubt from the record that a claim under a *federal* statute or the *Federal* Constitution was presented in the state courts and that those courts were apprised of the nature or substance of the federal claim at the time and in the manner required by the state law. Otherwise, we cannot be sufficiently sure, when the state court whose judgment is being reviewed has not addressed the federal question that is later presented here, that the issue was actually presented and silently resolved by the state court against the petitioner or the appellant in this Court.

Id. at 502 (emphasis in original) (holding that because petitioner failed to raise federal claim in the state proceedings and the state supreme court failed to rule on a federal issue, Court was without jurisdiction and writ was dismissed). Because no state court ruled on any federal question, this Court does not have jurisdiction to review this case.

II. Assuming this Court has jurisdiction to review the orders of the Alabama Supreme Court, Industrial's constitutional rights have not been impaired.

A. Industrial Technologies Received Due Process and Equal Protection Under the Fourteenth Amendment to the United Stated Constitution.

Industrial argues that the no-opinion order of the Alabama Supreme Court affirming the no-opinion order of the trial court violates its rights under the Fourteenth Amendment to the United States Constitution, for three reasons.

First, Industrial argues that the record did not support the decision of the Alabama Supreme Court to affirm summary judgment. Industrial cites *Vachon v. New Hampshire*, 414 U.S. 478 (1974) and *Zenith Radio Corp. v. Matsushita Electric Industrial Co.*, 723 F.2d 238, 304 (3d Cir. 1983) in support of its argument that a lack of evidence in the record supporting summary judgment violates Industrial's right to due process. *Vachon* was a criminal case in which an individual who sold a vulgar button to a minor was convicted under a New Hampshire statute which made it unlawful to "willfully" contribute to the delinquency of a minor. Because there was no evidence in the trial record that the defendant personally sold the item to the minor, this Court held that "willfully" had not been established and reversed the conviction. The Court cited *Harris v. United States*, 404 U.S. 1232, 1233 (1971) for the rule that "[i]t is beyond question, of course, that a conviction based on a record lacking any relevant evidence as to a crucial element of the offense charged . . . violate(s) due process." The other case cited by Industrial, *Zenith Radio* (overruled by this Court on other grounds), was a case in which the federal circuit court

simply inserted a footnote citing *Vachon* for the general principle that "a judgment supported by no evidence on an essential element violates due process." *Id.* at 304 n.55.

Both of these cases are inapposite because in this case the record supported the trial court's entry of summary judgment. Under Rule 56(c)(3) of the *Alabama Rules of Civil Procedure*, summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The Alabama Supreme Court reviews *de novo* an appeal from summary judgment. *Ex parte Union Camp Corp.*, 816 So.2d 1039, 1042 (Ala. 2001). The Alabama Supreme Court properly affirmed summary judgment based on the record because Industrial failed to satisfy conditions precedent to coverage or indemnification. Industrial failed to provide a sworn proof of loss (as opposed to examination under oath) specifically required by the policy. Under Alabama law, summary judgment was appropriate on this ground. *Nationwide Insurance Co. v. Nilsen*, 745 So.2d 264, 267 (an insurer's obligation to pay or to evaluate the validity of an insured's claim does not arise until the insured has complied with the terms of the contract with respect to submitting claims); *United Insurance Company of America v. Cope*, 630 So.2d 407, 412 (until plaintiff submitted a claim in the form specified by the terms of the policy, the insurer had no duty to investigate the claim). Additionally, summary judgment was proper because Industrial failed to notify Capital Alliance of the loss "as soon as possible" or "promptly" as required under the policy. Despite learning of the destruction of the equipment in 1995, the record evidence revealed that Industrial elected not to report the loss to Capital

Alliance until 1998. Further, It failed to ask for a defense of the Jacobs Bank litigation. Not until five years after the policy of insurance expired did It make a request for a defense—of the Whitney Bank litigation. The Whitney Bank litigation arose from a contract signed by Mr. Hill four years after the insurance policy expired. In sum, the record before the trial court and the Alabama Supreme Court supported the entry of summary judgment, and therefore any due process challenge to the no-opinion order fails.

Secondly, Industrial argues that its Fourteenth Amendment rights were violated because it was "denied a remedy and/or access to the courts." Industrial cites several cases that purportedly support this argument, although they are completely dissimilar to the present set of issues. Two of the cases deal with the issue of denial of access to the courts through the requirement of the payment of court fees. *Boddie v. Connecticut*, 401 U.S. 371 (1971) (holding that where women who lived in poverty were barred from going to court to obtain a divorce because they could not pay the required fees, due process requirements were violated); *United States v. Kras*, 409 U.S. 434 (1973) (holding that, unlike the fees involved in *Boddie*, the fees required of impoverished petitioner in bankruptcy did *not* violate the Constitution). Two of the cited cases deal with bias in the enforcement of the law. *Marshall v. Jerrico, Inc.*, 446 U.S. 238 (1980) (statutory requirement that fines collected in FLSA proceeding be returned to a branch of the Department of Labor did *not* create an impermissible risk of bias in violation of due process clause of the Fifth Amendment); and *In Re Murchison*, 349 U.S. 133 (1955) (bias of trial judge violated due process, where the same judge who sat as a state's one-man grand jury and heard witness testimony, also presided over a contempt hearing where witnesses were found in contempt for their conduct during that one-man grand jury).

None of these cases or principles apply to this case. Industrial was not denied access to the court or a remedy in the courts. The Constitution requires that "an opportunity [be] granted at a meaningful time and in a meaningful manner for a hearing appropriate to the nature of the case." *Boddie*, 401 U.S. at 379 (internal quotation marks and citations omitted). Industrial does not like the outcome of the case, but that does not mean that Industrial's constitutional rights to court access were violated, or that the process was somehow biased or inherently unfair. The petition should be denied on this issue.

Industrial's third contention is that the orders of the trial court and the Alabama Supreme Court denied Industrial's right to a remedy and/or an appeal that all other persons with similar property interest claims receive, in violation of the equal protection clause of the Fourteenth Amendment. This argument is premised on Industrial's belief that the summary judgment is unsupported by the record which, as previously discussed, is an incorrect belief. Additionally, Industrial cites no case indicating that the Alabama Supreme Court's orders in this case violate its constitutional right to equal protection. Industrial cites *Plyer v. Doe*, 457 U.S. 202 (1982), in which this Court held that Texas could not deny to undocumented alien schoolchildren the free public education that it provided to children who were United States citizens or legal aliens. Industrial also cites *F.S. Royster Guao Co. v. Virginia*, 253 U.S. 412 (1920) (Virginia law that exempted from income tax domestic corporations who did no business within that state was an arbitrary classification and did not comply with equal protection, where domestic corporations that conducted business both inside and outside the state had to pay income tax on income from outside the state); and *Connell v. Sears Roebuck & Co.*, 722 F.2d 1542 (5th Cir. 1983) (not an equal

protection case). Industrial cites no authority for its proposition that the facts of this case implicate equal protection issues, and in fact no such issues exist. The petition should be denied as to this ground.

B. Rule 53 of the *Alabama Rules of Civil Procedure* Does Not Impair Contracts, Prevent Performance Under Contracts, or Prevent Enforcement of Contract Rights. The Contracts Clause of the United States Constitution is Not Implicated in This Case.

Industrial claims that Rule 53 of the *Alabama Rules of Civil Procedure* denied a remedy to Industrial for breach of the insurance contract with Capital Alliance, in violation of the contract clause of the United States Constitution, Article I, § 10 ("No State shall . . . pass any . . . Law impairing the Obligation of Contracts."). The Alabama rule allows "no opinion" affirmances by state appellate courts:

> ARAP 53(a) Affirmance Without Opinion.
>
> The Supreme Court or the Court of Civil Appeals may affirm a judgment or order of a trial court without an opinion if the court determines:
>
> (1) That an opinion in the case would serve no significant precedential purpose; and
>
> (2) That one of the following circumstances exists:
>
> > (A) The judgment or order appealed from is based on findings of fact that are not clearly, plainly, or palpably erroneous;

> (B) The evidence adequately supports the jury verdict on which the judgment or order is based;
>
> (C) In a nonjury case in which the judge has made no specific findings of fact, the evidence would support those findings that would have been necessary to support the judgment or order;
>
> (D) The order of an administrative agency is sufficiently supported by the evidence in the record;
>
> (E) The appeal is from a summary judgment, a judgment on the pleadings, or a judgment based on a directed verdict, and that judgment is supported by the record; or
>
> (F) The court, after a review of the record and the contentions of the parties, concludes that the judgment or order was entered without an error of law.

This provision does not prevent Industrial from performing under the contract of insurance (paying premiums and complying with the contract's provision) or from enforcing rights under the contract. This rule allowing Alabama appellate courts to rule without writing an opinion does not deny enforcement rights. The Federal Courts are also permitted to issue "no opinion" decisions. *See Federal Rules of Appellate Procedure* 36(a)(2). Industrial cites no authority that would support the construction urged Industrial. The petition should therefore be denied on this issue.

CONCLUSION

In conclusion, Capital Alliance requests that this Court deny the petition for writ of certiorari sought by Industrial. Capital Alliance respectfully asserts that this Court lacks jurisdiction over this case, and further that no constitutional violations have occurred.

Respectfully submitted,

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(3)

Supreme Court, U.S.
FILED
AUG 31 2005
OFFICE OF THE CLERK

No. 05-108

In The

SUPREME COURT OF THE UNITED STATES

INDUSTRIAL TECHNOLOGIES, INC.,

Petitioner,

v.

CAPITAL ALLIANCE INSURANCE COMPANY
and
CAPITAL ASSURANCE COMPANY,

Respondents.

On Petition For Writ Of Certiorari
To The Supreme Court of Alabama

REPLY TO BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the United States Supreme Court has jurisdiction.

II. Whether the right to due process of law guaranteed to Industrial Technologies, Inc., by the Fourteenth Amendment to the United States Constitution was deprived when the Trial Court and the Alabama Supreme Court each issued no opinion decisions granting motions for summary judgment to two (2) insurance companies that Industrial has sued for breach of contract and bad faith.

III. Whether the no opinion decision granting summary judgment to said insurance company defendants was tantamount to the denial of a remedy to Industrial Technologies, Inc., and access to the courts contrary to the Fourteenth Amendment due process clause of the United States Constitution.

IV. Whether the no opinion decision denying Industrial's claims is tantamount to the denial of Industrial's right to a jury trial remedy and of the right to an appeal remedy when each is enjoyed by all other persons in the Sate of Alabama alleging similar claims and similarly situated as to the facts of the Industrial Technologies claims and thereby violated the equal protection clause of the Fourteenth Amendment to the United States Constitution.

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II. The right to due process of law guaranteed to Industrial Technologies, Inc., by the Fourteenth Amendment to the United States Constitution was deprived when the Trial Court and the Alabama Supreme Court each issued no opinion decisions granting motions for summary judgment to two (2) insurance companies that Industrial has sued for breach of contract and bad faith.

III. The no opinion decision granting summary judgment to said insurance company defendants was tantamount to the denial of a remedy to Industrial Technologies, Inc., and access to the courts contrary to the Fourteenth Amendment due process clause of the United States Constitution.

IV. The no opinion decision denying Industrial's claims is tantamount to the denial of Industrial's right to a jury trial remedy and of the right to an appeal remedy when each is enjoyed by all other persons in the Sate of Alabama alleging similar claims and similarly situated as to the facts of the Industrial Technologies claims and thereby violated the equal protection clause of the Fourteenth Amendment to the United States Constitution.

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I. THE UNITED STATES SUPREME COURT HAS JURISDICTION.

28 U.S.C. § 1257 states in pertinent part:

"(a) Final judgments or decrees rendered by the highest Court in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any state is drawn in question on the grounds of its being repugnant to the Constitution, treaties, or laws of the United States....or....any title right privilege or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States."

1. Alabama law grants Industrial, and all persons similarly situated, the right to a jury trial on issues raised by a breach of contract action including the condition precedent performances which were asserted in the case below. See HealthSouth Rehab. Corp v Falcon Management, 799 So2d 177 (Ala. 2001), United Fidelity and Guaranty Ins. Co. v Baldwin County Homeowners Assoc., 770 So2d 72 (Ala. 2000). Article 1, Section 11, Constitution of Alabama (1901), 12-2-7(4), Code of Alabama, 1975.

2. Alabama law grants Industrial, and all persons similarly situated, an appeal as of right to the Alabama Supreme Court in such cases and requires a *de novo* review of summary judgment decisions, judgments and orders. See Article VI Section 328 6.01, 6.02 Constitution of Alabama, 1901; 12-2-7, Code of Alabama, 1975; Ex parte Union Camp Corp. 816 So2d 1039 (2001). The review would clearly show the waiver of all grounds now asserted by Respondents. Rhode Island Ins. Co. v Holley, 226 Ala. 320, 146 So. 817 (1933; Home Ind. Co. v Reed Equipment Co., Inc., 381 So.2d 45 (Ala, 1980).

3. The constitutional violations alleged herein could not have been raised, under the facts of this case, prior to the Alabama Supreme Court's No Opinion Affirmance of the No Opinion Trial Court Summary Judgment Order on December 17, 2004, because

the State may not impose the duty to file an objection to an unconstitutional judgment upon a person prior to the time that he can reasonably assume that it will occur.

The timeliness of the constitutional objection can be shown by a brief review of the Alabama law and procedure involved. The Alabama Supreme Court entered a No Opinion Affirmance of a trial court's No Opinion Judgment granting a Summary Judgement against Petitioner as to all claims raised by the Petitioner Industrial against the Insurance Defendants Capital Alliance Insurance and Capital Assurance Company on December 17, 2004. The Petition for Rehearing was timely filed in the Alabama Supreme Court. Petitioner specifically and specially raised constitutional issues caused by the cumulative no opinion judgments alleging that the No Opinion Judgment of the Alabama Supreme Court violated (1) the due process clauses of the Fourteenth Amendment to the United States Constitution; (2) the equal protection clause of the Fourteenth Amendment; and (3) as to any decision based on the 1992-1993 insurance contract, the contract clause to the United States Constitution, Article 1, Section 10, Clause 1. On February 11, 2005, the Petition for Rehearing was denied without opinion again under Rules 53(a)(1) and 53(a)(2)(F), *Alabama Rules of Appellate Procedure*. Since Alabama law and procedure provides for the right of *de novo* appellate review of summary judgment orders of a trial court as entered below, it was the first time that Petitioner could conclude that his case had been treated in a manner that violated the constitutional provisions alleged and that the Supreme Court had reviewed the trial court judgment as if the review was nothing more than a review of a trial court judgment by application/petition for a writ of certiorari.

Petitioner also contends that where a Petitioner clearly presents the issue to a state supreme court the jurisdiction of the United States Supreme Court will not depend on whether the state court addressed the constitutional/federal question. It is enough that the constitutional claims were clearly and specially made and presented for review at the appropriate time. (*Lynk v. La Porte Superior Court No. 2*, 789 F.2d 554 (7th Cir. 1986). Furthermore, Petitioner contends that it must be assumed that the court has been given fair opportunity to review the merits of

the petitioner's claim on direct appeal for purposes of presentation and exhaustion principles.

This court has jurisdiction under 28 U.S.C. § 1257 because petitioner has properly presented the constitutional issues specially and exhausted his only state court remedies on the constitutional issues raised by this petition. Indeed, the Alabama Supreme Court decisions of December 17, 2004, and February 11, 2005, are final as to all issues raised by the law applied in the record on appeal.

II. The right to due process of law guaranteed to Industrial Technologies, Inc., by the Fourteenth Amendment to the United States Constitution was deprived when the Trial Court and the Alabama Supreme Court each issued no opinion decisions granting motions for summary judgment to two insurance companies that Industrial had sued for breach of contract and bad faith. That is, the judgement is not supported by the facts.

Respondents, in their Brief in Opposition to the Petition for a Writ of Certiorari, contend that the decision of the Alabama Supreme Court was a correct decision based upon the facts and supported by independent state grounds. In asserting these defenses or positions in their brief, Respondents have included a statement or cluster of factual assertions that Petitioner contends are misleading. Examples of misleading factual omissions are as follows:

At page 1 of their Brief in Opposition, the Respondents contend or infer that the alleged August 14, 2002, insurance company letter concerning the Industrial insurance claims and demands only referred to the defense of a Whitney National Bank action. Respondents indicate that they denied a defense to Industrial because it was only an action against Petitioner Industrial for default in payments to Whitney on a note executed by Industrial not earlier than March 20, 2001; many years after all of the insurance contracts in question had expired by their terms. This factual reference omits to state that Count II of the Whitney Complaint against Industrial seeks to have the trial court declare Whitney's interest in several collateral and insurance proceeds matters placed before the court that may be

payable for any such damaged collateral. Moreover, Count II shows attached documents that result from capital insurance contracts, other contracts, secured documents, etc., covering a period from at least July, 1996 to the date of suit. Although it is undisputed that Whitney held the secured documents and UCC financing statements necessary to protect its interest in collateral and insurance proceeds, Respondents omit to state that they were issues included in the Count II claim and attached to the Complaint (C-12-42). Respondents also omit to state that the loss-payee provisions of each and every policy that the Capitals issued, either singularly or jointly, to Industrial secured the collateralized property involved in the Whitney litigation for proceeds payable on the destruction of the insured property in the event of a covered loss. Indeed, the Respondents omit facts that show they are, at least, a necessary party to the action.

At page 3 of Respondents' Brief, and again at page 9, Respondents contend that Industrial allegedly completed an assignment of all its rights and duties to Whitney National Bank, and breached the contract between them, which bars recovery. Respondents omit to disclose that Whitney legally rejected the assignment and asserted a legal rejection in the responsive pleading it filed in the trial court below. Moreover, Respondents omit to state that the qualifying loss payee, its successors by operation of law (merger), are allowed to pursue the secured collateral claims for proceeds under material provisions of the contract to the same extent as insured if such contract rights can be shown as an interest created by the insured . Therefore, the transfer of an interest in a loss payee lender specifically addressed in the policy does not breach the contract or bar recovery, which facts were also omitted by Respondents. The loss payee benefits are contract rights of Whitney. See Anderson v Brooks 446 So2d 36 (Ala. 1984).

At page 4 of Respondents' brief, they contend that the 1992-1993 policy contained no duty to defend and, therefore, they have no duty to pay attorney fees and/or litigation expenses to Industrial. Respondents omit to state that the 1992-1993 policy contained a duty to pay covered claims on conditions that were fulfilled by Industrial during 1993 and coverage benefits were properly demanded on April 5, 2002, prior to litigation of the

issues presented securing collection under the March 20, 2001 note. The omissions are specifically that Industrial reported the covered loss of wrongful conversion on June 28, 1993, submitted to a deposition statement on July 1, 1993, informed Capital Alliance of the Jacobs action and the conversion on July 1, 1993, the location of the property converted and its protection status at Goose Pond Industrial Park in Scottsboro, Alabama, and thereafter Capital Alliance traveled to said location, reviewed the protected property and optioned to await a judicial decision on the Jacobs title claim. (C.-677-678). Moreover, since Petitioner timely informed Respondents of the Jacobs lawsuit alleging title to the Industrial equipment insured by Capital Alliance, the Respondents acts, when it renewed and re-insured such collateral to Industrial in conformity with the banking requirements to insure the loss payee interest under all policies insured up to their expiration on January 28, 1997, conclusively shows its acknowledgment of the claim without further proof. Moreover, Industrial has shown that these are the same payee insurance proceeds that were claimed by Whitney National Bank in Count II of its action filed against Industrial. Whitney claimed that any such payment to Industrial was the collateralized security under its March 20, 2001, note action. Petitioner submits that these facts should, unless rebutted before a jury, conclusively show Respondents' liability under any one or all policies issued by Respondents covering the period from July 1992 to January 28, 1997. Clearly, Capitals' failure to pay a proper coverage payment demand renders Capital liable for unnecessary defense cost in a breach of contract action. Therefore, the failure of a duty to defend provision is also misleading.

At page 4 of the Respondents' Brief, they concluded that during December, 2001, Industrial did obtain a judgment against Jacobs Bank for conversion, which they contend was appealed after the trial court set aside the punitive damages imposed by the jury. Respondents omit to state that Jacobs Bank did not appeal the issue of conversion found adverse to Jacobs on December 7, 2001, or the court judgment concerning the assessment of compensatory damages for the conversion. Therefore, Respondents omit facts showing that the event of conversion was conclusively established on to-wit: December 7, 2001, well before the Whitney action against Industrial on July 2,

2002, and before Industrial's demands for the coverage or benefits on April 5, 2002. Therefore, Respondents omit facts that conclusively show a denial of coverage benefits by the Capital letter on August 14, 2002.

At page 4 of Respondents' Brief, the Respondents conclude that the trial court, after an appellate decision, entered judgement against Jacobs Bank and in favor of Industrial for the sum of $480, 310.00 plus accrued interest until November 19, 2003. They also allege satisfaction of judgement on January 6, 2004. Although the Respondents seem to imply that Industrial was paid for all of its losses at a later time, Respondents omit to state that the law of conversion damages in Alabama, and the Jacobs award would not compensate Industrial for property losses insured and due under the Respondents' coverage provisions. Respondents omit to state that even under the 1992-1993 policy, Industrial incurred additional contract losses after the December 7, 2001, award and litigation expense in the Whitney litigation, for Capital's failure to pay which would have been prevented by proper payment under the 1992-1993 policy. Respondents omit to state that losses under the 1995-1996 policy and the renewal policy in 1996-1997 were valued as replacement value without deduction for depreciation and covered losses far in excess of the Jacobs award.. Moreover, Respondents omit to state that Industrial had provided all information they sought on May 4, 1998. It is undisputed that they did not request any new information after May 4, 1998, or assert a basis of claim denial, which is clearly a waiver under Alabama law. Rhode Island Ins. Co. v Holley, 226 Ala. 320, 146 So. 817 (1933); Home Ind. Co. v. Reed Equipment Co., 381 So2d 45 (Ala. 1980).

At pages 5 and 6 of their Brief, the Respondents also contend that (1) all policies provide a limitation of the time in which an insured can bring an action concerning a policy provision (2) a faxed memo from its agent, Fred Gouge, on May 11, 1994, was not responded to by Richard Hill as agent for Industrial and (3) that Mr. Hill did not contact Capital Alliance concerning a claim until February 1998. The Respondents omit to inform the Court that (1) Alabama law prevents insurance companies such as the Capitals from inserting such time limitations in policies of insurance issued in Alabama, which

renders such provisions unenforceable under 6-2-15, Code of Alabama, 1975; and Hopkins v. Lawyers Title Ins. Co. 514 So.2d 786 (Ala. 1975); (2) The alleged faxed memo of May 11, 1994, from Fred Gouge is not shown to have been received by Industrial and, even if received, fails to describe or address any issues or question presented under the policy; (3) that Industrial agents fully informed Capital Alliance on May 12, 1997, when a claim was filed by Ms. Pat Wingard, as Industrial's claim agent (Turner Insurance and Bonding Company) (C.-830) and, again, on January 18, 1998, by its counsel who forwarded much material to the Capitals during March 1998. Moreover, Respondents omit to state that they did not request any relevant information after Industrial insisted on proceeding with a claim and provided claims information to the Capitals during May, 1997, January 1998, February 1998, March 1998, and a most thorough and complete sworn proof of loss deposition on May 4, 1998.

The statements made on pages 9 and 10 of the Respondents' Brief, alleging that Industrial never requested a defense to the Jacobs Bank claim is also confusing because it ignores an undisputed and absolute demand for all coverage benefits on May 4, 1998.

In their Brief on page 19, the Respondents conclude or imply that the Alabama Supreme Court found that a failure of Petitioner to supply a requested proof of claim provided sufficient legal grounds under Alabama law to deny the Petitioner's claim but omits to state that such action is proper only where a valid reason exists to provide it in a form proof of claim, such as those forms needed for computer loading purposes, and other purposes desired by the company, which purpose or purposes were not conveyed to Petitioner and, indeed, not mentioned prior to litigation. Respondents omit to state that Alabama otherwise holds that no particular type proof of claim is required. Petitioner also omits to state that the first proof of claim form filing request by Capital Alliance Insurance Company, an Alabama insurance corporation, sent to Industrial's counsel was designated a Florida form proof of claim which did not conform to a valid purpose. The Capitals never used a failure of proof of claim or failure of information as a basis of withholding further action or claim denial at anytime prior to the litigation in this case. See Equitable

Life Ins. Co. v Dorriety 229 Ala. 352, 157 So. 59; Globe & Rutgers Fire Ins. Co. v Pappas, 219 Ala. 332, 122 So. 346. Here, Petitioner provided the most substantiated documentation of its claim that one can imagine, cooperated with the Capitals until a title decision could be obtained as to covered property on December 7, 2001, and was never informed by the Capitals that a complete denial of coverage may occur for any reason asserted prior to the Whitney litigation. The conduct so described is, of course, a complete waiver of all conditions precedent under the policy or policies and based upon the facts presented, the best that Respondents could hope for is a dispute that must be tried by a jury under Alabama law. See Home Indemnity Co. v Reed Equipment Co. Inc., 381 So2d 45 (Ala. 1980) as to waiver and United Fidelity v. Baldwin County Homeowners Assoc. 770 So2d 72 (Ala. 2000) as to jury trial issues concerning failure of timely notice allegations. Therefore, the record below does not support the judgment as discussed by Vachon v. New Hampshire 414 U.S. 478 (1974); and Harris v. United States, 404 U.S. 1232 (1971).

III. The no opinion decisions granting summary judgment to said insurance company defendants was tantamount to the denial of a remedy to Industrial Technologies, Inc., and access to the courts contrary to the Fourteenth Amendment due process clause of the United States Constitution.

Petitioner contends that the facts of this case as stated above show that the no opinion orders of the Supreme Court denied Industrial reasonable access to the courts and a reasonable remedy for its claims. The Constitution requires:

1. That a reasonable opportunity be granted to present petitioner's claim.
2. In a meaningful manner
3. In a hearing
4. Appropriate to the nature of the case.

Petitioner contends that a reasonable opportunity for an appropriate claim hearing to the nature of this case as also mandated by the Constitution of Alabama , 1901, was not given to him in either the trial court or on appeal to the Supreme Court as required in Boddie v. Conneticut 401 U.S. 371, 379 (1971).

IV. The no opinion decisions denying Industrial's claims is tantamount to the denial of Industrial's right to a jury trial remedy and of the right to an appeal remedy when each is enjoyed by all other persons in the State of Alabama alleging similar claims and similarly situated as to the facts of the Industrial Technologies claims and thereby violated the equal protections clause of the Fourteenth Amendment to the United States Constitution.

The Alabama Supreme Court judgments denied it a jury trial in violation of Article 1, Section 11, Constitution of Alabama and in violation of 22-2-7(4) Code of Alabama, 1975. It also denied Industrial a right of appeal in that the court's judgments reduced the remedy to nothing more than a petition for a writ of certiorari to review a trial court order contrary to the equal protection clause of the Fourteenth Amendment to the United States Constitution. The denials constitute arbitrary acts of state government. Plyer v. Doc, 457 U.S. 202 (1982) and F.S. Royster Guar. Co. v. Virginia 253 U.S. 412 (1920).

CONCLUSION

In conclusion, Petitioner requests that the Petition be granted and that a writ of certiorari issue to review the judgment of the Supreme Court of Alabama and, thereafter, that the court enter an order reversing said judgment as void and remand the case with instruction to grant a jury trial on all issues presented in this Petition.

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